

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KATHLEEN B. NEROSA and	:	CIVIL ACTION
ROBERT NEROSA	:	
	:	
v.	:	
	:	
STORECAST MERCHANDISING	:	
CORPORATION and STORECAST	:	
CORPORATION OF AMERICA	:	NO. 02-440

M E M O R A N D U M

WALDMAN, J.

August 28, 2002

I. Introduction

Plaintiff Kathleen Nerosa has asserted an array of claims under Title VII, the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), the Equal Pay Act ("EPA") and the Pennsylvania Human Relations Act ("PHRA") against her former employer, Storecast Merchandising Corporation ("Storecast").<sup>1</sup> Her husband, Robert Nerosa, has asserted a claim for loss of consortium.

Defendant has moved to dismiss Counts II, IV, V, VI, VII, VIII, IX, X and XI of plaintiffs' complaint as well as portions of Counts I and III for failure to state cognizable claims. Defendant has also requested sanctions against plaintiffs' attorney to compensate defendant for legal fees

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<sup>1</sup> The complaint also names Storecast Corporation of America as a defendant. In fact, the two defendants are the same entity. Storecast Merchandising Corporation was formerly known as Storecast Corporation of America. Thus, although there has been no request to correct the caption, the court refers to the defendant in the singular.

incurred in responding to "frivolous positions" taken by plaintiffs in their brief after being "presented with clear legal authority explaining the deficiencies therein."

## **II. Factual Allegations**

The facts as alleged by plaintiffs are as follow.

Ms. Nerosa was hired by defendant in October 1985 as a full-time employee after working part-time for 1 ½ years as a merchandiser. In April 1991, she was promoted to the supervisory position of retail manager. In March 2000, she was transferred to the I-Star Division where she was responsible for supervising 16 team leaders.

Ms. Nerosa was paid a lower salary than Frank Gilmartin and Richard Haggerty, two male supervisors in their thirties who performed similar job functions and possessed similar job titles as plaintiff. The male supervisors were assigned more sales associates and more stores than was Ms. Nerosa and territories less saturated with competitors. They were thus able to generate more sales volume and revenues. During the course of her employment, Ms. Nerosa never received any negative performance evaluations or written or verbal warnings about her performance.

In September 2000, Ms. Nerosa was placed on medication to treat several related medical conditions including shortness of breath, a heart murmur, sinus tachycardia, rapid heart beat, chest pain and non-insulin dependent diabetes mellitus.

On December 1, 2000, a treating physician provided her with a medical note advising that she should refrain from heavy or strenuous physical activity such as pushing and pulling due to a cardiac condition. Ms. Nerosa could perform all essential functions of her job duties which did not include heavy or strenuous physical tasks. She had subordinate employees who could push or pull heavy boxes when an occasion to do so arose.

Ms. Nerosa presented the medical note to Matthew Kiernan, her supervisor and defendant's director of operations, on December 1, 2000. Later that day he berated Ms. Nerosa for nearly thirty minutes about an assigned project and a minor variation in her performance of certain job duties. She became faint, dizzy and weak. She collapsed into a wall and was taken to a hospital.<sup>2</sup>

On January 5, 2001, Mr. Kiernan advised Ms. Nerosa that she was being terminated for poor work performance. Three days

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<sup>2</sup>Plaintiff submits a copy of the hospital report with her brief in response to defendant's motion which she invites the court to consider. It shows that she was examined in the emergency room for shortness of breath and anxiety. In plaintiff's account to the admitting nurse there is no mention of an onset of symptoms during an altercation with a supervisor. Plaintiff related that she had been under a lot of stress at work and had a sudden onset of symptoms while standing at a copying machine. While plaintiff references her hospital visit in the complaint, she does not specifically reference or append the hospital report. In resolving the instant motion, the court will thus disregard the report and assume to be true the description of this event alleged in the complaint.

later, she received a letter of termination from defendant which did not specify any reason for her termination.<sup>3</sup>

At the time of her termination, Ms. Nerosa was 53 years of age and earned an annual salary of \$33,700. Her replacement was a 34-year-old male with little prior relevant work experience who earned a lesser salary.

On March 26, 2001, Ms. Nerosa filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") which was cross-filed with the Pennsylvania Human Relations Commission ("PHRC"). She alleged that she was terminated because of her age and disability and was discriminated against in salary based on her gender. On October 31, 2001, the EEOC issued a formal Dismissal of Ms. Nerosa's charges on the ground that the agency could not conclude from its investigation that any violation had occurred. The EEOC advised plaintiff of her right to sue. The instant action followed.<sup>4</sup>

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<sup>3</sup> Defendant's employee handbook provides a list of progressive disciplinary steps generally to be undertaken prior to termination for other than a series of listed major infractions. None were undertaken in Ms. Nerosa's case.

<sup>4</sup> Plaintiff expatiates for seven pages in her brief about the dismissal of her claims by the EEOC. She contends that the agency conducted an inadequate investigation, was guilty of actionable misfeasance and violated her due process rights including the right to cross-examine adverse witnesses. None of this has any bearing on the court's disposition of the instant motion.

The complaint contains 92 paragraphs and spans 37 pages. Much of what is pled is repetitive and the eleven counts into which the complaint is segmented fail to correspond in any coherent manner to the various legal claims and theories advanced.

In Count I, captioned "Violation of the Age Discrimination in Employment Act," plaintiffs actually set forth multiple claims which are then replicated in subsequent counts. Ms. Nerosa alleges that her termination was "part of a pattern and practice of unlawful age, sex and disability discrimination and age, sex and disability harassment." She also alleges that the defendant violated the Equal Pay Act by paying her a lesser salary than male supervisors.

In Count II, Ms. Nerosa alleges that defendant terminated her because of her age and created a work environment hostile to persons of her age in violation of the ADEA.

In Count III, Ms. Nerosa alleges that defendant engaged in unlawful age, sex and disability discrimination and age sex and disability harassment in violation of the PHRA.

In Count IV, she alleges that defendant engaged in age, sex and disability discrimination as well as age, sex and disability harassment and retaliated against her for opposing this conduct with indifference to her federally protected rights

thus entitling her to punitive damages under the PHRA, the ADEA, the ADA and Title VII.

In Count V, she alleges that defendant violated Title VII by engaging in unlawful age, sex and disability discrimination and a pattern or practice of unlawful age, sex, and disability harassment.

In Count VI, Ms. Nerosa alleges that defendant violated the ADA by refusing to permit her to continue to work, with or without a reasonable accommodation, based on her record of impairment and defendant's erroneous perception of her inability to perform the essential functions of her job. In Count VIII, she alleges that the same conduct constitutes a violation of the PHRA.

In Count VII, she alleges that defendant violated the ADA by failing to reasonably accommodate her perceived impairment and permit her to continue to work. In Count IX, captioned "Retaliation Pursuant to the Americans with Disabilities Act," she alleges that defendant wrongfully terminated her, refused to acknowledge her accommodation request and engaged in unspecified deceptive conduct calculated to prevent her from continuing to perform her job duties. In Count X, she alleges that the same conduct constitutes a violation of the PHRA.

In Count XI, Mr. Nerosa asserts a claim for loss of consortium.

### III. DISCUSSION

Defendant asserts that Ms. Nerosa failed to administratively exhaust her hostile work environment, retaliation and gender-based discrimination claims, and failed to state cognizable hostile work environment, retaliation or disability claims under federal or state law.<sup>5</sup> Defendant also asserts that Mr. Nerosa may not predicate a loss of consortium claim on the employment discrimination statutes relied upon and that Ms. Nerosa may not recover punitive damages on her ADEA and related PHRA claims.<sup>6</sup>

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim while accepting as true the claimant's allegations and reasonable inferences therefrom, and viewing them in the light most favorable to her. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A court may also consider any document

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<sup>5</sup> The PHRA is construed and applied in a manner consistent with the federal employment discrimination statutes. See Weston v. Pennsylvania, 251 F.3d 420, 425 n.3 (3d Cir. 2001); Kelly v. Drexel University, 94 F.3d 102, 105 (3d Cir. 1996).

<sup>6</sup> In their reply memorandum, plaintiffs concede that punitive damages are not recoverable under the ADEA and the PHRA. Defendant has not moved to strike the punitive damages claim under Title VII or the ADA, but rather to dismiss the Title VII and ADA claim in their entirety.

referenced in or integral to the complaint on which plaintiff's claim is based. See In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426 (3d Cir. 1997); In re Westinghouse Securities Litigation, 90 F.3d 696, 707 (3d Cir. 1996). A court, however, need not credit conclusory allegations or legal conclusions in deciding such a motion to dismiss. See General Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 333 (3d Cir. 2001); Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997); L.S.T., Inc. v. Crow, 49 F.3d 679, 683-84 (11th Cir. 1995). A complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

#### **A. Administrative Exhaustion**

As a precondition for filing suit under Title VII, the ADEA, the ADA and the PHRA, a plaintiff must exhaust a claim by presenting it in an administrative charge to the EEOC and the PHRC. See Antol v. Perry, 82 F.3d 1291, 1295-96 (3d Cir. 1996) (plaintiff must exhaust Title VII claims); Fakete v. Aetna, Inc., 152 F. Supp. 2d 722, 731 (E.D. Pa. 2001) (plaintiff must exhaust PHRA and ADEA claims); Deily v. Waste Mgt. of Allentown, 118 F. Supp. 2d 539, 541 (E.D. Pa. 2000) (plaintiff must exhaust ADA claims).



The scope of a judicial complaint is not limited to the four corners of the administrative charge. See Love v. Pullman, 404 U.S. 522, 527 (1972); Hicks v. ABT Assoc., 572 F.2d 960, 963 (3d Cir. 1978); Duffy v. Massinari, 202 F.R.D. 437, 440 (E.D. Pa. 2001). It is delimited, however, to acts fairly within the scope of the charge or the investigation which can reasonably be expected to result from it. See Holtz v. Rockefeller & Co., 258 F.3d 62, 83 (2d Cir. 2001); Hicks, 572 F.2d at 966; Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976); Shouten v. CSX Transportation, Inc., 58 F. Supp. 2d 614, 616 (E.D. Pa. 1999).

There must be a close nexus between the facts supporting each claim or an additional claim in the judicial complaint must fairly appear to be an explanation of the original charge or one growing out of it. See Duffy, 202 F.R.D. at 440; Galvis v. HGO Services, 49 F. Supp. 2d 445, 448-49 (E.D. Pa. 1999). A plaintiff, for instance, may not maintain a hostile work environment or retaliation claim based on an administrative charge of discriminatory termination. See Wright v. Philadelphia Gas Works, 2001 WL 1169108, \*2 (E.D. Pa. Oct. 2, 2001) (dismissing hostile work environment and retaliation claims where EEOC charge asserted only claim of racially-motivated discharge).

In her administrative charge, Ms. Nerosa checked boxes indicating that she was discriminated against on the basis of

sex, age and disability. She indicated that this discrimination took place on January 5, 2001, the day she was informed by Mr. Kiernan of her termination. In the narrative section, she related that she had been terminated because of her age and after advising defendant of a medical restriction, and that she was paid less than male co-workers with similar responsibilities. She also referenced the incident in which Mr. Kiernan unfairly chastised her.<sup>7</sup>

A hostile work environment exists when a workplace is permeated with discriminatory intimidation, ridicule and insult so severe or pervasive as to alter the terms and conditions of the victim's employment and create an abusive working environment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). Conduct that is not sufficiently severe or pervasive to create an objectively hostile or abusive environment is not actionable. Id.

"[C]onduct must be extreme to amount to a change in the terms and conditions of employment." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). Incidents of harassment are pervasive if they occur in concert or with regularity. See

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<sup>7</sup>Plaintiff's counsel submitted a ten-page letter on October 4, 2001 to the EEOC in support of her claims. It is abundantly clear from a reading of this submission that plaintiff's claims were limited to unlawful termination based on age, gender and disability, and disparate compensation to which there is a brief reference.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990).<sup>8</sup>

To state a hostile work environment claim, a plaintiff must show that she suffered intentional discrimination because of her protected status; the discrimination was pervasive and regular; the discrimination detrimentally affected the plaintiff and would detrimentally affect a reasonable person of the same protected status in that position; and the existence of respondeat superior liability. See Weston, 251 F.3d at 426; Kunin v. Sears, Roebuck & Co., 175 F.3d 289, 293 (3d Cir. 1999).<sup>9</sup>

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<sup>8</sup> Plaintiffs variously use the terms harassment and hostile work environment. It is not altogether clear whether they are using these terms interchangeably or in an attempt to assert different claims. Defendant has understandably presumed the former and proceeded to address the hostile work environment claims accordingly. In any event, there is no distinct cause of action for harassment. If acts of harassment are sufficiently severe or pervasive, they may give rise to a hostile work environment claim.

<sup>9</sup> The Third Circuit has not addressed whether a claim based on hostile work environment is available under the ADEA. See Tumolo v. Triangle Pacific Corp., 46 F. Supp. 2d 410, 412 n.2 (E.D. Pa. 1999). Courts that have considered an age based hostile work environment claim have similarly required the plaintiff to show that she is over forty; that she was subject to harassment; and that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment. See Larcher v. West, 147 F. Supp. 2d 538, 543 (5th Cir. 2001). See also Burns v. AAF-McQuay, Inc., 166 F.3d 292, 294 (4th Cir. 1999) (reciting elements but declining to decide whether such a claim would be viable); Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996). The Third Circuit has recognized a claim for a work environment hostile to persons with disabilities which similarly requires a plaintiff to show, inter alia, that she has a disability within the meaning of the ADA and was subjected to severe or persistent harassment. See Walton v. Mental Health Ass'n, 168 F.3d 661, 667 (3d Cir. 1999).

To establish vicarious liability of an employer for the actions of a co-worker, a plaintiff must show that the employer failed to provide a reasonable avenue for complaint or was aware of the alleged harassment and failed to take appropriate remedial action. See Weston, 251 F.3d at 427. When an actionable hostile work environment is created by a supervisor with immediate or successively higher authority over the plaintiff, the burden is on the employer to show it exercised reasonable care to prevent and promptly correct harassing behavior and the plaintiff unreasonably failed to pursue corrective opportunities it provided or otherwise to avoid harm, unless the supervisor's harassment culminates in a tangible adverse employment action in which case vicarious liability is established. See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

In her administrative complaint, Ms. Nerosa related an instance of verbal abuse by a supervisor which resulted in her becoming faint. Nowhere in her administrative complaint did plaintiff state or allege facts which would show that she had been subjected to a hostile work environment. Plaintiffs appear to think that proof of bias or animus of a type required to establish any claim of intentional discrimination necessarily shows the existence of a hostile work environment. Ms. Nerosa's current claims of a hostile work environment are not within the scope of her EEOC complaint or the investigation which could

reasonably have been expected to flow from the claims of discrimination asserted in her administrative charge. See Cheek v. Western & Southern Life Ins. Co., 31 F.3d 497, 503 (7th Cir. 1994) ("Ordinarily a claim of sexual harassment cannot be reasonably inferred from allegations in an EEOC charge of sexual discrimination."); Aramburu v. Boeing Co., 112 F.3d 1398, 1409-1410 (10th Cir. 1997) (hostile work environment claim not reasonably related to wrongful discharge claim contained in EEOC charge).<sup>10</sup>

An employer may not retaliate against an employee because she has opposed a practice made unlawful by Title VII, the ADEA, the ADA or the PHRA respectively, or because she made a charge, testified, assisted or otherwise participated in an

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<sup>10</sup> Plaintiffs have also failed to set forth a cognizable hostile work environment claim in their court complaint. The age-based hostile work environment claim is based on three factual allegations: that younger employees were given preferential job assignments and greater assistance, that Storecast failed to train its employees in prevention of age discrimination and that Storecast failed to take prompt remedial action to stop age discrimination. Assuming an age-based hostile work environment claim is cognizable, plaintiffs' allegations fall far short of stating one. In support of the gender-based hostile work environment claim, plaintiffs allege that Ms. Nerosa was paid less than similarly situated male employees and assigned more competitive sales territories with less assistants. While a decision to pay less to a female manager than a similarly situated male manager or intentionally to achieve the same result by assigning less lucrative sales territories to female managers is actionable discrimination, it does not as such constitute a sexually hostile work environment. Plaintiffs have not alleged facts which would show that Ms. Nerosa was subject to severe or pervasive harassment because of a disability or perceived disability.

investigation, hearing or other proceeding under any of these statutes. See 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623; 42 U.S.C. § 12203(a); 43 Pa. C.S.A. § 955(d). Essential to any such claim are factual allegations which show that the employee engaged in protected activity and was then the subject of an adverse employment action as a result. See Fogleman v. Mercy Hospital, Inc., 283 F.3d 561, 567-68 (3d Cir. 2002); Goosby v. Johnson & Johnson Medical, Inc., 228 F.3d 313, 323 (3d Cir. 2000).

In her administrative charge, Ms. Nerosa did not check the box for retaliation. Nowhere in her administrative complaint, filed subsequent to her termination, does plaintiff use the word retaliation. She does not allege that she protested against discrimination of any kind or had participated in any way in an investigation or proceeding involving discrimination at or prior to the time of her termination.<sup>11</sup> Plaintiff did not

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<sup>11</sup> Whether an employee's request for a reasonable accommodation is protected activity under the ADA is questionable based on the actual wording of the statute. See Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 16 (1st Cir. 1997); Williams v. Eastside Lumberyard and Supply Co., 190 F. Supp. 2d 1104, 1120 (S.D. Ill. 2001). A number of courts, however, have inferred or assumed that such action is protected. See id. at 1121 & n.14. Ms. Nerosa did relate that she presented defendant with a doctor's note regarding her need to avoid heavy or strenuous physical tasks. In the next sentence, however, plaintiff makes clear that such tasks were not essential functions of her job but that she had voluntarily "sometimes assisted subordinate employees with their job duties which required lifting, pushing and pulling heavy boxes." The ADA provides no basis for a request for accommodation, protected or otherwise, to enable an employee to perform the job duties of other employees.

exhaust any claim for retaliation. See Watson v. SEPTA, 1997 WL 560181, \*7 (E.D. Pa. Aug. 28, 1997) (retaliation claims barred for failure to exhaust administrative remedies where in EEOC charge plaintiff neither alleged "retaliation" nor alleged that she had complained about discrimination), aff'd, 207 F.3d 207 (3d Cir. 2000), cert. denied, 531 U.S. 1147 (2001).<sup>12</sup>

Nowhere in her administrative complaint did Ms. Nerosa state that she was terminated on the basis of gender. She did, however, check a box indicating discrimination based on sex. She also stated that she was paid less than two less experienced male managers with similar responsibilities and was replaced by a 34-year-old male. Were plaintiff claiming only that she was discharged on the basis of age, the fact that her replacement was male would be superfluous. It fairly appears that the scope of an investigation resulting from plaintiff's administrative charge would likely encompass the role gender may have played in her termination.<sup>13</sup>

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<sup>12</sup> Plaintiffs' court complaint is also devoid of any allegations that Ms. Nerosa protested against discrimination or had participated in any investigation or proceeding under Title VII, the ADEA, the ADA or the PHRA at or prior to the time of her termination.

<sup>13</sup> In Count V, plaintiffs allege that defendant engaged in unlawful age, sex and disability discrimination and harassment in violation of Title VII. Title VII does not provide relief for age or disability discrimination.

## **B. Disability Claims**

To sustain a prima facie case of discrimination in violation of the ADA, a plaintiff must show that she has a disability, that she is a qualified individual and that she has suffered an adverse employment action because of that disability. See Deane v. Pocono Med. Center, 142 F.3d 138, 142 (3d Cir. 1998).

A qualified individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111. The ADA defines a disability as:

- (A) A physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) A record of such impairment; or
- (C) Being regarded as having such impairment.

42 U.S.C. § 12102(2).<sup>14</sup>

To survive a motion to dismiss, a plaintiff must allege facts which show she has an impairment that "substantially limits" at least one "major life activit[y]." Sacay v. Research Foundation of the City Univ. of New York, 44 F. Supp. 2d 496, 501-02 (E.D.N.Y. 1999). See also Johnson v. Lehigh County, 2000 WL 1507072, \*4 n.4 (E.D. Pa. Oct. 10, 2000) ("simply restating

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<sup>14</sup> The PHRA contains a substantially identical definition. See 42 Pa. C.S.A. § 954(p).



the language of the statute without describing a disability fail[s] to state a claim under the ADA"); Parisi v. Coca-Cola Bottling Co., 995 F. Supp. 298, 302 (E.D.N.Y. 1998) ("plaintiff must allege a factual basis that would support a finding of substantial limitation of a major life activity, and may not rely upon conclusory allegations of such a limitation") (internal quotations omitted), aff'd, 172 F.3d 38 (2d Cir. 1999); McCann v. Catholic Health Initiative, 1998 WL 575259, at \*2 (E.D. Pa. Sept. 8, 1998); Sutton v. New Mexico Dept. of Children, Youth and Families, 922 F. Supp. 516, 518 (D.N.M. 1996).

A major life activity is "substantially limited" if it is affected in a "considerable" manner or "to a large degree." Toyota Motor Mfg. Kentucky, Inc. v. Williams, 122 S. Ct. 681, 691 (2002). To be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts her from doing activities that are of central importance to most people's daily lives. "The central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." Id. at 693. See also Heilweil v. Mount Sinai

Hosp., 32 F.3d 718, 722 (2d Cir. 1994), cert denied, 514 U.S. 1147 (1995).<sup>15</sup>

Ms. Nerosa has several related medical conditions which she treats with prescribed medication. The only resulting limitation identified in her complaint or in response to defendant's discussion of the major life activity requirement is an inability to engage in heavy lifting, pushing, pulling or similar strenuous physical tasks.<sup>16</sup>

Some capacity for lifting is of central importance to most people's daily lives. See 29 C.F.R. App. § 1630.2(i).<sup>17</sup> A

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<sup>15</sup> Medication and other measures taken to correct or mitigate an impairment must be taken into account when determining whether an individual is substantially limited in a major life activity and is thus disabled within the meaning of the ADA. See Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999).

<sup>16</sup> At one point in their brief, plaintiffs reiterate Ms. Nerosa's medical conditions and seem to suggest that this satisfies the requirement of a disability. Insofar as this was their intent, plaintiffs appear to confuse or conflate an impairment with a disability.

<sup>17</sup> Although no agency has been given the authority to issue regulations interpreting the term disability, the EEOC has nonetheless done so. See Sutton, 527 U.S. at 479. The Supreme Court has expressly declined to decide what level of deference the interpretive guidelines are due. See Toyota, 122 S. Ct. at 690; Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 563 n.10 (1999); Sutton, 527 U.S. at 480. The Third Circuit, however, has relied on the regulations and appended interpretative guidelines promulgated by the agency including the referenced guideline suggesting that lifting can be a major life activity. See Marinelli v. City of Erie, 216 F.3d 354, 363 (3d Cir. 2000). Although not specifically so listed by the EEOC, pushing and pulling would seem to be sufficiently comparable manual tasks. There is no sound basis, however, for the suggestion that the ability to perform strenuous physical tasks is a major life activity.

limitation on the ability to lift, however, does not substantially limit an individual from performing activities of central importance to most people's daily lives. See Mellon v. Federal Express Corp., 239 F.3d 954, 957 (8th Cir. 2001) (15 pound lifting restriction and requirement that plaintiff avoid other stress to right arm not disability); Martinelli, 216 F.3d at 363-364; Snow v. Ridgeview Medical Center, 128 F.3d 1201, 1207 (8th Cir. 1997) ("general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability"); Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996); Ray v. Glidden Co., 85 F.3d 227, 229 (5th Cir. 1996); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996).

The inability to engage in strenuous and heavy lifting, pulling or pushing does not render Ms. Nerosa disabled. Her conclusory allegation that she has a disability is unsupported by her actual factual allegations.

Ms. Nerosa also asserts that she was terminated because of her "record of impairment and the defendant employers' erroneous perception of her inability to perform the essential functions of her job."

To maintain a claim based on a record of an impairment, a plaintiff must show she had an impairment which substantially limited a major life activity. See Olson v. General Electric

Astrospace, 101 F.3d 947, 953 (3d Cir. 1996); Kresge v. Circuitek, 958 F. Supp. 223, 225 (E.D. Pa. 1997). Plaintiffs do not allege facts which would show that Ms. Nerosa's condition substantially limited a major life activity at the time of her termination or in the past. She has failed to set forth a cognizable claim under 42 U.S.C. § 12102(2)(B).

Individuals who are regarded as having a disability are deemed disabled within the meaning of the ADA. See 42 U.S.C. § 12012(2)(C). To maintain a claim under this subsection, a plaintiff must show that a covered entity entertains the misperception that she has an impairment that substantially limits a major life activity when in fact she has no such impairment or has an impairment that is not so limiting. See Sutton, 527 U.S. at 489; Tice v. Centre Area Transportation Authority, 247 F.3d 506, 514 (3d Cir. 2001). The employer must have perceived that the impairment substantially limited plaintiff in a major life activity and not merely with respect to a particular job. See Murphy v. United Parcel Service, 527 U.S. 516, 522 (1999); Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 192 (3d Cir. 1999) ("[a]n employer who simply and erroneously believes that a person is incapable of performing a particular job will not be liable under the ADA").

The mere fact that an employer is aware of an employee's impairment does not demonstrate that the employer

regarded the employee as disabled. See Kelly, 94 F.3d at 109. That defendant knew plaintiff was incapable of engaging in heavy lifting, pushing or pulling would not demonstrate that the employer perceived her as being disabled. See Thompson v. Holy Family Hosp., 121 F.3d 537, 541 (9th Cir. 1997).

Plaintiffs assert that defendant was under the misperception that Ms. Nerosa was unable to perform the essential functions of her job. They do not allege any facts, however, from which it reasonably appears that defendant regarded her as incapable of performing a class or broad range of jobs or was otherwise substantially limited in a major life activity as required to maintain a claim under 42 U.S.C. § 12102(2)(C). See Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 784 (3d Cir. 1999).

The only basis provided in the complaint for any perception or misperception by defendant regarding plaintiff's impairment is the note from plaintiff's physician which she presented to Mr. Kiernan on December 1, 2000. That note states only that plaintiff should refrain from heavy or strenuous pushing, pulling or physical tasks. One can reasonably infer that upon reading the note, Mr. Kiernan would perceive that plaintiff could not perform the referenced tasks but not that she was substantially limited in a major life activity. As it is not alleged that heavy or strenuous physical tasks were part of Ms.

Nerosa's job duties, one cannot reasonably infer that Mr. Kiernan would perceive even that she was physically incapable of performing her particular job.

The failure of an employer to make reasonable accommodations for a disabled employee is also a form of actionable discrimination. See 42 U.S.C. § 12112(b)(5)(A). Plaintiffs assert that defendant failed to accommodate Ms. Nerosa but do not elaborate. There is no allegation that defendant required Ms. Nerosa to perform heavy or strenuous physical tasks or forbade her to utilize subordinates to perform such tasks if and as needed. Rather, plaintiffs assert that defendant perceived Ms. Nerosa was unable to perform her job and suggest that the appropriate "accommodation" was to allow her to continue to do so as she had been.

A perception that an employee is incapable of performing a particular job is not the same as a perception that she is disabled. Moreover, an employer is not obligated to accommodate a perceived disability by ignoring it or otherwise. See Weber v. Strippit, Inc., 186 F.3d 907, 916-17 (8th Cir. 1999), cert. denied, 528 U.S. 1078 (2000); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999); Newberry v. East Texas State University, 161 F.3d 276, 280 (5th Cir. 1998); Danyluk-Coyle v. St. Mary's Med. Ctr., 2001 WL 771048, \*3 (E.D. Pa. Apr. 5, 2000); Balliet v. Heydt, 1997 WL 611609, \*6 (E.D. Pa. Sept.

25, 1997), aff'd, 176 F.3d 471 (3d Cir.), cert. denied, 528 U.S. 877 (1999). See also Taylor, 177 F.3d at 196 (noting it would be "odd to give an impaired but not disabled person a windfall because of her employer's erroneous perception of disability when other impaired but not disabled people are not entitled to accommodation").

### **C. Loss of Consortium**

A claim for loss of consortium arises from the marital relationship and is based on the loss of a spouse's services and companionship resulting from an injury. See Cleveland v. Johns-Manville Corp., 690 A.2d 1146, 1149 (Pa. 1997); Sprague v. Kaplan, 572 A.2d 789 (Pa. Super. 1990). Loss of consortium is a derivative claim. See Patterson v. American Bosch Corp., 914 F.2d 384, 386 n.4 (3d Cir. 1990); Washkul v. City of Philadelphia, 998 F. Supp. 585, 590 (E.D. Pa. 1998); Stipp v. Kim, 874 F. Supp. 663, 666 (E.D. Pa. 1995); Little v. Jarvis, 280 A.2d 617, 620 (Pa. Super. 1971). It is limited to situations which the other spouse may recover in tort. See Murray v. Commercial Union Ins. Co., 782 F.2d 432, 438 (3d Cir. 1986); Szydlowski v. City of Philadelphia, 134 F. Supp. 2d 636, 639 (E.D. Pa. 2001).

A spouse's right to recover under an employment discrimination statute does not support a loss of consortium claim. See Hettler v. Zany Brainy, Inc., 2000 WL 1468550, \*7

(E.D. Pa. Sept. 27, 2000); Danas v. Chapman Ford Sales, Inc., 120 F. Supp. 2d 478, 489 (E.D. Pa. 2000) (dismissing loss of consortium claim alleged to derive from spouse's ADEA and PHRA claims); Stauffer v. City of Easton, 1999 U.S. Dist. LEXIS 11407, \*1 (E.D. Pa. July 20, 1999). See also Quitmeyer v. Southeastern Pennsylvania Transportation Authority, 740 F. Supp. 363, 370 (E.D. Pa. 1990) (no spousal recovery for loss of consortium based on violations of other spouse's civil rights). The only claims asserted by Ms. Nerosa are for employment discrimination under Title VII, the ADA, the ADEA and the PHRA.

#### **D. Defendant's Request for Sanctions**

Defendant refers to "numerous deficiencies "in plaintiffs' complaint which it not altogether uncharitably characterizes as "quite frankly a mess." Defendant, however, has not moved for sanctions under Rule 11. Defendant asks for an award of attorney's fees incurred in filing its reply memorandum in response to "completely irrelevant" matters argued at length in plaintiffs' voluminous opposition brief. Defendant relies on a court's inherent authority to impose sanctions upon an attorney for bad faith, vexatious, wanton, or oppressive actions in the conduct of litigation. See Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991).

An award of fees and costs pursuant to the court's inherent authority to control litigation generally requires a



finding of bad faith. See In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions, 278 F.3d 175, 181 (3d Cir. 2002). Bad faith exists where there is some indication of an intentional advancement of a baseless contention for an ulterior purpose such as harassment or delay. See Ford v. Temple Hosp., 790 F.2d 342, 347 (3d Cir. 1987); Loftus v. Southeastern Pennsylvania Transportation Authority, 8 F. Supp. 2d 458, 461 (E.D. Pa. 1998). The exercise of a court's inherent power to sanction should generally be reserved for cases of egregious conduct where the use of such inherent power is clearly necessary. See Klein v. Stahl GMBH & Co. Maschinefabrik, 185 F.3d 98, 109 (3d Cir. 1999); Martin v. Brown, 63 F.3d 1252, 1265 (3d Cir. 1995).

Plaintiffs' complaint and brief are prolix and often redundant. Their brief is largely unresponsive to the deficiencies noted in defendant's motion to dismiss and contains many misstatements of applicable principles of law. Plaintiffs needlessly engage in a lengthy discussion in which they object to the investigatory procedures employed by the EEOC. This is followed by a lengthy discussion of the elements of an age discrimination claim which defendant did not move to dismiss. Plaintiffs continue to assert claims of age and disability discrimination under Title VII which clearly prohibits only

discrimination based on race, color, religion, gender or national origin.

Defendant, however, has made no showing that plaintiffs' submissions were made in bad faith for an improper purpose rather than through carelessness or a tenacious form of wishful thinking by counsel. While plaintiffs have unnecessarily complicated the litigation of this action and have made some conspicuous or glaring mistakes, terms used to define egregious, their conduct falls short of atrocious, heinous, monstrous or outrageous, other synonyms for egregious. The court is not convinced that an exercise of the inherent power to impose sanctions is required in the circumstances presented.

#### **IV. Conclusion**

Ms. Nerosa has failed to exhaust or to plead cognizable hostile work environment or retaliation claims. She has failed to plead a cognizable claim of unlawful disability discrimination or to specify pertinent unpled facts she inadvertently omitted in response to defendant's clear identification of the deficiencies in the disability claims as pled. Mr. Nerosa has failed to state a cognizable loss for consortium claim. Punitive damages are unavailable under the ADEA or PHRA.

Ms. Nerosa has exhausted and adequately pled claims of gender discrimination under Title VII and the PHRA. Defendant has not challenged the legal sufficiency of Ms. Nerosa's claims

of age discrimination under the ADEA and PHRA or her claim under the Equal Pay Act. Defendant does not contest that punitive damages are available under Title VII.

Consistent with the foregoing, the court will grant defendant's motion to dismiss Ms. Nerosa's hostile work environment and disability discrimination claims in Counts I and III; her age hostile work environment claim in Count II; her claims in Count IV for punitive damages under the PHRA, the ADEA and the ADA; and, her claims in Count V for an age and disability hostile work environment, and for age and disability discrimination under Title VII. Counts VI (ADA disability discrimination), VII (ADA failure to accommodate), VIII (PHRA disability discrimination), IX (retaliation), X (retaliation) and XI (loss of consortium) will be dismissed in their entirety.

Defendant's request for sanctions will be denied.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KATHLEEN B. NEROSA and	:	CIVIL ACTION
ROBERT NEROSA	:	
	:	
v.	:	
	:	
STORECAST MERCHANDISING	:	
CORPORATION and STORECAST	:	
CORPORATION OF AMERICA	:	NO. 02-440

O R D E R

AND NOW, this                      day of August, 2002, upon consideration of defendant's Motion to Dismiss (Doc. #3) and plaintiffs' response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to plaintiff's hostile work environment and disability discrimination claims in Counts I and III; age-based hostile work environment claim in Count II; punitive damage claims under the PHRA, the ADEA, and the ADA in Count IV; hostile work environment, age and disability discrimination claims in Count V; and all claims asserted in Counts VI, VII, VIII, IX, X and XI; and, said Motion is otherwise **DENIED**. **IT IS FURTHER ORDERED** that defendant's request for sanctions is **DENIED**.

BY THE COURT:

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JAY C. WALDMAN, J.